

SENATE BILL REPORT

EHB 2040

As Reported by Senate Committee On:
Labor, Commerce & Consumer Protection, March 19, 2009

Title: An act relating to the work of the joint select committee on beer and wine regulation.

Brief Description: Concerning the work of the joint select committee on beer and wine regulation.

Sponsors: Representatives Conway and Condotta.

Brief History: Passed House: 3/09/09, 92-3.

Committee Activity: Labor, Commerce & Consumer Protection: 3/19/09 [DP].

SENATE COMMITTEE ON LABOR, COMMERCE & CONSUMER PROTECTION

Majority Report: Do pass.

Signed by Senators Kohl-Welles, Chair; Keiser, Vice Chair; Holmquist, Ranking Minority Member; Franklin, Honeyford, King and Kline.

Staff: Mac Nicholson (786-7445)

Background: The Legislature established a Joint Select Committee on Beer and Wine Regulation (Select Committee) in 2008 to review the laws relating to the manufacturer, distribution, and sale of beer and wine (2ESSCR 8407). The Select Committee met during the 2008 interim and produced a final report with recommendations.

Tied House Law. The Tied House Law prohibits certain relationships between the liquor manufacturer, distributor, and retailer tiers. The financial interest part of the Tied House Law prohibits a manufacturer, importer, distributor, or any person directly or indirectly financially interested in such a business from having any direct or indirect financial interest in a licensed retailer. In addition, a manufacturer, importer, or distributor may not own any of the property on which a licensed retailer conducts business, and may not hold a retail license. A number of exceptions to the financial interest part of the Tied House Law have been enacted, including the following: wineries and breweries may sell at retail on their premises; a brewery may hold up to two licenses for a restaurant and/or tavern on its premises or at separate locations; and a nonprofit association or a wine industry association with an officer, director, owner, or employee of a winery on its board of directors may hold a special occasion license.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

The moneys' worth part of the Tied House Law prohibits a manufacturer, importer, or distributor from advancing to a licensed retailer, and a retailer from receiving money or moneys' worth. A number of exceptions to the moneys' worth prohibition have been enacted, including the following:

- manufacturers, distributors, and importers may provide display and stocking services, price case goods, and perform other normal business services for retailers;
- wineries may provide certain personal services at certain retail licensees;
- wineries and breweries and retailers may provide information about and link to each other on their websites;
- manufacturers, distributors, and importers may enter arrangements with sports/entertainment facility licensees or affiliated businesses for brand advertising and promotion of events; and
- manufacturers, distributors, and importers may provide point of sale materials and brand signs to retailers and provide advertising and pouring of beer or wine at tasting or judging events.

Post and Hold. It is unlawful for a beer or wine manufacturer, importer, or distributor to modify prices without notifying and obtaining Liquor Control Board (LCB) approval. Beer and wine suppliers and distributors must post the prices at which beer and wine are sold to distributors and retailers. Until recently, a rule required suppliers and distributors to adhere to posted prices for at least 30 days. These provisions were known as the "post and hold" requirement. The "post and hold" requirements were struck down in 2008 by the Ninth Circuit Court of Appeals in the *Costco v. Hoen* litigation.

Minimum Mark-up. Beer and wine manufacturers and distributors must mark-up the price of their product to a distributor or retailer, as the case may be, by at least 10 percent above the acquisition/production cost.

Summary of Bill: The legislation makes a number of legislative recognitions and findings.

Tied House Law. The Tied House Law is repealed and new provisions are adopted. Generally, financial interests between industry members or affiliates and other industry members or retailers are permitted unless the interest has resulted or is more likely than not to result in undue influence or in an adverse impact on public health and safety. The financial interests between tiers must be structured so that an entity in one tier may not hold a license in another tier in its name. Provisions in existing law allowing an entity with a license in one tier to hold a license in or exercise the privileges of another tier are retained.

"Industry member" is defined as a licensed manufacturer, producer, supplier, importer, wholesaler, distributor, authorized representative, certificate of approval holder, warehouse, and any affiliates, subsidiaries, officers, directors, partners, agents, employees, and representatives of any industry member.

"Undue influence" is defined as one retailer or industry member directly or indirectly influencing the purchasing, marketing, or sales decisions of another retailer or industry member by any agreement or other business practices.

"Adverse impact on public health and safety" is defined as a practice or occurrence that has resulted or is more likely than not to result in alcohol being made significantly more attractive or available to minors, overconsumption, under age consumption, or other harmful or abusive forms of consumption.

A complaint process is established whereby any person may file a complaint with the LCB asserting undue influence or an adverse impact on public health or safety. The LCB may investigate and issue an administrative violation notice and/or deny the license to the industry member or retailer. If the transaction resulting in financial interest has already been consummated, the LCB has the authority to require that the transaction be undone.

Industry members generally continue to be prohibited from advancing, and retailers continue to be prohibited from accepting, moneys' worth. The exceptions in current law to the moneys' worth prohibition are retained with some changes, and an additional exception for branded promotional items is added. Branded promotional items are items of nominal value and may be given to a retailer by an industry member. Examples of branded promotional items include trays, lighters, blotters, postcards, pencils, coasters, menu cards, meal checks, napkins, clocks, mugs, glasses, hats, visors, and other items of similar nominal value, whether a single item or in the aggregate. The items must be used exclusively by the retailer or the retailer's employees in a manner consistent with the liquor license, must bear imprinted matter of the industry member only, may not be provided to retail consumers, and may not be targeted to or appeal to youth.

Any person may file a complaint with the LCB asserting that the provision of branded promotional items amount to an undue influence or have an adverse impact on public health and safety or is otherwise inconsistent with statutory criteria. The LCB may investigate such complaints and issue an administrative violation notice.

Industry members and retailers must keep and maintain records for three years of all items, services, and moneys' worth furnished and all financial ownership or interests.

Post and Hold. Intent language in the pricing provisions is deleted. The prohibition against modifying prices at the manufacturer or distributor level without notification to and approval of the LCB is deleted. The requirement for beer and wine distributors to file a price posting with the LCB is deleted. Manufacturers and distributors must maintain a list of prices at their licensed location.

Minimum Mark-up. The requirement that suppliers mark-up prices to distributors or retailers and that distributors mark-up prices to retailers by 10 percent of acquisition/production cost is removed. The prohibition against sales below cost is retained.

Appropriation: None.

Fiscal Note: Available.

Committee/Commission/Task Force Created: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony: PRO: This bill is a major modernization of the state tied house law. Major players in the tied house system came together to provide the guidance in the legislation. The conclusions and recommendations of the Joint Select Committee were bi-partisan and input was taken from many folks including the prevention community. There is balance in the bill. The goal of the bill was to bring the state's beer and wine regulatory system into the twenty-first century while preserving consumer protections.

OTHER: The bill is commendable but there are two concerns in the area of prevention. The first issue is the elimination of the mandatory minimum mark-up, which should be kept in law. The second concern is alcohol advertising, clothing and underage drinking. Hats, visors, and shirts should not be included as branded promotional items.

Persons Testifying: PRO: Representative Conway, prime sponsor; Michael Transue, Washington Restaurant Association; Carolyn Logue, Washington Food Industry; Ron Main, Washington Beer and Wine Wholesalers Association; Jean Leonard, Washington Wine Institute; Carrie Tellefson, Distillery Representatives Association of Washington; Rick Garza, Washington State Liquor Control Board.

OTHER: Seth Dawson, Washington Association for Substance Abuse and Violence Prevention.